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No. 93-1585

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN,
individually and as next friends of WILLIAM BOOHER, Jr.,
Petitioners,
v.
PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

PETITIONERS' REPLY MEMORANDUM

David H. Berg
Counsel of Record
Berg & Androphy
3704 Travis
Houston, TX 77002
713-524-5622

Philip D. Zelikow
79 J.F.K. Street
Cambridge, MA 02138
Counsel for Petitioners

ALPHA LAW BRIEF COMPANY • HOUSTON, TEXAS • (713) 981-9000 • 1-800-981-9001

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Respondent's Briefs in Opposition offer their version of the First Amendment law and the facts. This Reply Memorandum will discuss only four new points raised by Respondents that are material to a legal judgment on the Petition.

First, Respondents claim there is "no evidence" Booher promised not to publicize her daughter's rape. (Brief for Respondent Donahue, 11). But, in fact, Booher did promise to keep quiet; she expressly agreed not to go on the Donahue Show, where she ultimately made the only public disclosure in this case. Petitioner Nancy Anonsen testified in her deposition:

> A: My mother told me that she had a chance to go on the Donahue Show. ...She asked me to go on the show with her. We discussed it. I told her I wouldn't go on the show with her. I didn't how I could possibly help anybody by doing that. That it would hurt too many people. She then told me that she agreed with me. That I was right. And that she called the Donahue people and told them that she wouldn't be on their show.
>
> Q: That's what she said?
>
> A: That's what she said to me.

(Tr. 1261) Petitioners' account must be taken as true, since the case appeals from a summary judgment. Petitioners did not just rely on the promissory estoppel theory in *Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991) to defeat Booher's supposed First Amendment right to disclose, but that theory is certainly presented by the record.

Respondent's fallback argument was that the estoppel argument from *Cohen v. Cowles Media* presented a new dimension to the First Amendment argument addressed by the Texas court. But the Texas court recognized that Booher had agreed to her daughter's plea not to go on Donahue and told her daughter she would not appear. (App. 7a) Moreover, this Court has long recognized that "parties are not confined here to the same arguments which were advanced in courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). Indeed, the very case cited by Respondents, *Illinois v. Gates*, 462 U.S. 213 (1983) quoted the principle that applies here, endorsing arguments "so connected with [the original claim] in substance as to form but another ground or

reason for alleging the invalidity of the personal judgment." *Dewey v. Des Moines*, 173 U.S. at 197-98, quoted in *Illinois v. Gates*, 462 U.S. at 223.

Second, all Respondents argue that this Court should not reach the federal question because of an adequate and independent state ground for decision. This is a surprising argument. Not only did the Texas court not rule on the state grounds favored by Respondents, the Texas court did not even *cite* the Texas constitution in its opinion. We are left with the "elementary rule" that if the federal question was taken up and addressed on the merits by the state court this Court's jurisdictional concern disappears. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); see *Cohen v. Cowles Media*, 111 S.Ct. at 2517; *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

Third, Respondent Booher claims, "Petitioners falsely state that Miriam never reported the rape to the police before the Donahue program." (Respondent Booher Brief, 3) We are content to let the police speak for themselves on this point. According to a 1989 police report prepared after the Donahue broadcast and made part of this record, Investigator Mary Margaret Kesterson learned of the rape from Nancy in 1980, confronted Booher and asked her:

> ...if she had done anything about it or if she wanted to. ...Booher responded that she had not done anything about it nor did she want to do anything. Investigator Kesterson related that she told Mickey Booher it was not too late but that Mickey Booher did not want to talk about any details and did not want to do anything about it.

(Tr. 1111) Six years later Booher told the director of the Arkansas State Police, who had heard the same rumor, that "she would not be a witness, she didn't want anything done." (Tr. 134)

Fourth and finally, Respondents argue for the first time that *Butterworth v. Smith*, 494 U.S. 624 (1990) controls the holding of this case. In that case this Court held that a grand jury witness could tell about the corruption he had recounted to a grand jury. That case turned on a finding of inadequate state interest to support the categorical prohibition in the overbroad Florida law, especially to suppress speech about governmental misconduct, the "core of the First Amendment." 494 U.S. at 630-34. But this Court has already found it "undeniable" that the states' interest in protecting the identities of victims of sexual offenses from disclosure "are highly significant interests." *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989). Petitioners, in their Petition, accepted and met the burden of showing how their approach, unlike the Florida prohibition, was tailored to protect these significant state interests while respecting First Amendment concerns. (Petition, 23-25)

Respectfully submitted,

David H. Berg
Counsel of Record
Berg & Androphy
3704 Travis
Houston, TX 77002
713-524-5622

Philip D. Zelikow
79 J.F.K. Street
Cambridge, MA 02138

Counsel for Petitioners

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